

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

DAVID ECKERT, §
Plaintiff, §
§
v. §
§
THE CITY OF DEMING, §
DEMING POLICE OFFICERS §
BOBBY OROSCO, ROBERT CHAVEZ, §
and **OFFICER HERNANDEZ,** §
HILDAGO COUNTY, HILDAGO COUNTY §
SHERIFF OFFICERS DAVID ARREDONDO, §
ROBERT RODRIGUEZ, and PATRICK §
GREEN; DEPUTY DISTRICT ATTORNEY §
DANIEL DOUGHERTY, GILA REGIONAL §
MEDICAL CENTER, ROBERT §
WILCOX, M.D., and OKAY ODOCHA, M.D., §
§
Defendants. §
§

No. 13-CV-00727 CG/WPL

MOTION FOR DISMISSAL WITHOUT PREJUDICE

COMES NOW the Defendant, Okay Odocha, M.D. (hereinafter "Dr. Odocha"), by and through his attorneys of record, Brown & Gay, P.C. (Remo E. Gay and Melissa A. Brown), and, pursuant to New Mexico Rules of Civil Procedure Rule 1-012(B)(1) NMRA 2013 and New Mexico Statutes Annotated §41-5-15(A) (1978), respectfully moves the Court for the entry of an Order dismissing Plaintiff's Complaint as against Dr. Odocha without prejudice pending review of Plaintiff's medical claims against Dr. Odocha by the New Mexico Medical Review Commission ("NMMRC") and rendition of a written decision by the NMMRC as to those claims. As grounds in support of the Motion, Dr. Odocha states as follows:

1. At all times material hereto, Dr. Odocha was a "qualified healthcare provider" as that term is defined under the New Mexico Medical Malpractice Act ("the Act"), NMSA §

41-5-15(A) (1978). *See* redacted copy of the declarations page of Dr. Odoch'a's policy of insurance, attached hereto as Exhibit "A."

2. As a qualified healthcare provider, under New Mexico law, Dr. Odoch'a is entitled to all benefits and protections of the Act.

3. The Act requires that, before any lawsuit may be filed in any Court of otherwise competent jurisdiction in the State of New Mexico against a qualified healthcare provider relating to a "malpractice claim," an application for review of the alleged medical malpractice claim must first be submitted to the NMMRC for the rendition of a written decision as to those claims. NMSA § 41-5-15(A) (1978) ["no malpractice action may be filed in any court against a qualifying health care provider before application is made to the medical review commission and its decision is rendered"].

4. A "malpractice claim" is defined by the Act as "any cause of action arising in [New Mexico] against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient, whether the patient's claim or cause of action sounds in tort or contract, and includes but is not limited to actions based on battery or wrongful death." NMSA §41-5-3(C) (1978).

5. The Plaintiff's Complaint against Dr. Odoch'a alleges, in part, that Dr. Odoch'a owed a duty of care to Plaintiff "conforming to professional standards." *See*, Plaintiff's Complaint at ¶ 207. The Complaint goes on to allege that Dr. Odoch'a, in his capacity as a general surgeon, "failed to conform to professional standards by performing unnecessary medical treatments." *Id.* at ¶ 208. The Complaint also contends that Dr. Odoch'a failed to obtain the Plaintiff's informed consent for medical examinations and treatment under New Mexico law, and that Dr. Odoch'a

committed battery on the Plaintiff by performing the medical examinations and treatment at issue.

Id. at ¶¶ 211-214; 224-227.

6. Clearly, the Plaintiff's Complaint against Dr. Odoch'a alleges "malpractice claims," as defined by the Act. In fact, the entirety of the Plaintiff's allegations against Dr. Odoch'a, regardless of how they are characterized by the Plaintiff in the Complaint, arise solely from Dr. Odoch'a's practice of medicine and, thus, fall within the ambit of the Act.

7. The Plaintiff has filed his lawsuit against Dr. Odoch'a without first submitting his claims to the NMMRC for a hearing and the rendition of a written decision as to those claims.¹

8. The aforesaid proceeding before the NMMRC is required and, therefore, the Court is without what essentially amounts to jurisdiction over Dr. Odoch'a until the claims of the Plaintiff against him are first brought before, and a decision is rendered by, the NMMRC. As such, the Court should dismiss the Complaint without prejudice pending review of the Plaintiff's claims against Dr. Odoch'a by the NMMRC. *See, Rupp v. Hurley*, 2002-NMCA-023, 21, 131 N.M. 646, 41 P.3d 914 (Ct. App. 2002) [“We emphasize that the necessity for an MRC determination prior to the filing of a medical malpractice claim remains a mandatory procedural threshold that must be crossed in the ordinary case. However, failure to comply with this requirement should not result in evisceration of the plaintiff's cause of action; other less drastic remedies are available. For example, if an early complaint is brought to the attention of the district court prior to the MRC decision, the district court should normally dismiss the complaint without prejudice”].

¹ Counsel for Dr. Odoch'a understands that, after contacting the Plaintiff's attorney regarding the anticipated filing of this Motion, Plaintiff has submitted an application to the NMMRC, although Dr. Odoch'a's counsel has not received a copy of that application and, to the undersigned's knowledge, a NMMRC panel hearing has not yet been scheduled.

9. In the alternative, Dr. Odoch'a requests that the above-captioned and numbered lawsuit be stayed in its entirety pending review of the Plaintiff's medical malpractice claims by the NMMRC, and the rendition of a written decision by the NMMRC on the same.

10. The attorneys for the parties have been contacted regarding the filing of this Motion. Counsel for the City Defendants does not oppose the Motion. Counsel for the Hidalgo Defendants does not oppose the Motion. Counsel for Robert Wilcox, M.D. does not oppose the Motion. Counsel for the Plaintiff is understood to oppose the Motion with respect to any claims against Dr. Odoch'a other than those set forth in Counts XII and XIII of Plaintiff's Complaint.

WHEREFORE, the Defendant, Okay Odoch'a, M.D., requests that the above-entitled Complaint be dismissed without prejudice, as against him, pending presentation by Plaintiff of his malpractice claims against Dr. Odoch'a to the New Mexico Medical Review Commission and the rendition of a written decision by the NMMRC, or, in the alternative, that the entire case be stayed pending the rendition of a written decision by the New Mexico Medical Review Commission, and for such other and further relief as the Court deems just and proper.

BROWN & GAY, P.C.

By /s/ Remo E. Gay
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CERTIFICATE OF SERVICE

The foregoing was sent via CM/ECF to the following counsel of record this 20th day of November, 2013:

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/s/ Remo E. Gay

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